

(1984) 03 BOM CK 0034
In the Bombay High Court
Case No : First Appeal No. 35 of 1982

Ghanshyamdas Vallabhadas Gujrathi

APPELLANT

Vs

Brijraman Rasiklal

RESPONDENT

Date of Decision : 15-03-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47
Limitation Act, 1963 — Article 134, 58, 65

Citation : (1984) 2 BomCR 50

Hon'ble Judges : B.A. Masodkar, J; A.D. Tated, J

Bench : Division Bench

Advocate : R.M. Purandare, for the Appellant; C.R. Dalvi, for the Respondent

Final Decision : Dismissed

Judgement

A.D. Tated, J.—The defendant in Special Civil Suit No. 41 of 1978 preferred this appeal against the judgment and decree dated 27th March, 1981 passed by the learned Civil Judge (Senior Division), Nasik, decreeing the plaintiff's suit for recovery of possession of the property bearing C.T.S. Nos. 2402, 2403 and 2725 situate at Yeola, District Nasik, which originally belonged to the defendant and purchased by the plaintiff-decree holder with the permission of the Court in execution of the decree the plaintiff obtained against the defendant in Civil Suit No. 36 of 1942. The auction sale was held on 16th September, 1953 and 9th October, 1953 and it was confirmed on 19th November, 1953. The plaintiff purchased those properties and one more property bearing C.T.S. No. 2043 in the auction sale for Rs. 56,000/-. The plaintiff was awarded sale certificate. The name of the plaintiff was also recorded as owner thereof in the municipal records. There were some tenants on the land and some property was in possession of the defendant. It is the case of the plaintiff that the defendant agreed to deliver possession out of Court and from time to time assured the plaintiff that he would deliver possession and as per the assurance of the defendant the plaintiff kept quiet. In or about 1975 the plaintiff requested the

defendant to attorn the tenants to it. The defendant failed to do so and hence the plaintiff filed this suit for recovery of possession of the property and also claimed future mesne profits.

2. The defendant resisted the claim on the ground that the suit was barred by limitation. He also contended that the suit as brought was not tenable.

3. On the above pleadings, the learned trial Judge raised necessary issues and after referring them to trial he held that the defendant failed to prove that he perfected his title to the suit property by adverse possession. He found that the suit was within time and that the plaintiff was entitled to the possession of the property except C.T.S. No. 2043. On these findings he decreed the plaintiff's suit for possession of the said property and directed enquiry into future mesne profits under Order XX, Rule 12(1)(c) of the Code of Civil Procedure, 1908.

4. The learned Counsel for the appellant-defendant raised two contentions before us. The first was that the suit was barred by limitation under Article 65 of the First Schedule to the Limitation Act, 1963, and the second was that the suit was not tenable in view of the provisions of section 47 of the Code of Civil Procedure.

5. The plaintiff became the owner of the suit property by virtue of the auction sale in its favour and they have been mutated in its name. The evidence of Narayan Ramchandra Kakade (P.W. 1), who is in the employment of the plaintiff, shows that the defendant never asserted title hostile to the plaintiff. On the contrary, from time to time he sent letters, which are Exhibits 49 to 53, and in those letters he always assured the plaintiff that he could take possession of the suit property out of Court at any time. It shows that the defendant had no hostile animus and never wanted to assert title hostile to the plaintiff. It is pertinent to note that the defendant has not entered into the witness-box. Though the corpus was with the defendant, there was no animus on his part to claim title hostile to the plaintiff, and therefore, his possession never became adverse to the plaintiff. Article 65 of the First Schedule to the Limitation Act of 1963 provides 12 years' period of limitation for possession of an immovable property based on title, and the period of limitation begins to run when the possession of the defendant becomes adverse to the plaintiff. In the present case possession of the defendant was never adverse to the plaintiff, at least till 1975 when the plaintiff requested him to attorn the tenants to it and he failed to do so. The present suit was instituted in the year 1978, that is, well within 12 years from the day the defendant failed to comply with the request of the plaintiff to attorn the tenants to it. Consequently, we find that the learned trial Judge was right in finding that the claim of the plaintiff was not barred by limitation.

6. The learned Counsel for the appellant-defendant next contends that the proper remedy for the plaintiff was to apply for recovery of possession of the suit property in execution and that the suit for that purpose was barred by section 47 of the Code of Civil Procedure. In support of his contention he relied on the decision in Harnandrai Badridas Vs. Debidutt Bhagwati Prasad and Others, . We

have gone through the decision and we find that it is not applicable to the facts of the present case. It may be mentioned that an auction purchaser can apply for delivery of possession, and that application is governed by Article 134 of the First Schedule to the Limitation Act of 1963, which provides that the application has to be made within one year from the day the sale becomes absolute. The limitation for suit on the basis of title is provided in Article 65 of the First Schedule to the Limitation Act of 1963 and the limitation starts running from the time the possession of the defendant becomes adverse to the plaintiff. It is pertinent to note that in the Indian Limitation Act, 1908, Article 138 of the First Schedule provided limitation of 12 years for a suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was in possession at the date of the sale and the period of limitation began from the date the sale became absolute. In the Limitation Act of 1963 the corresponding provisions are contained in Article 65 *ibid* and there is marked change in providing the commencement of the period of limitation. After the Limitation Act of 1963 came into force, the possession of an immovable property on the basis of title could be sought by filing a suit within 12 years from the day the possession of the defendant become adverse to the plaintiff. Thus there are two remedies available to the auction purchase. He can apply in execution for delivery of possession within a period of one year from the date the sale becomes absolute, and he can also institute a suit for recovery of possession within 12 years from the date the possession of the defendant becomes adverse to him. The defendant never raised any question concerning the nature of the rights purchased by the plaintiff at the auction sale. On the contrary, he by various letters addressed to the plaintiff (Exs. 49 to 53) accepted the title of the plaintiff and offered to deliver possession out of Court. Consequently, there is no merit in the contention of the learned Counsel for the appellant defendant that a suit for possession of the property cannot be instituted by auction purchaser in view of the provisions of section 47 of the Code of Civil Procedure.

7. The learned Counsel for the appellant-defendant next contends that the plaintiff has also sought declaration while claiming possession of the suit property and as such Article 58 of the First Schedule to the Limitation Act of 1963 would apply and such suit should be filed within three years of the right to sue first accrues. We are unable to agree with the learned Counsel that as the plaintiff claimed declaration while suing for possession the suit would be barred, having not filed within three years of the auction sale becoming absolute. First, the relief for declaration claimed therein is not the main relief. The main relief in this case is of possession, and declaration is an ancillary relief and, therefore, the proper article of the Limitation Act of 1963 would be 65 and not 58 of the First Schedule. Secondly, the right to sue first accrued to the plaintiff only in the year 1975 when the defendant refused to attorn the tenants to it and asserted hostile title, the suit has been filed within three years thereof, and as such the claim for declaration is within the period prescribed by Article 58.

8. In the result, the appeal fails and it is hereby dismissed with costs.